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NO. 82-769

In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES GIBSON TUCKER, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, consistent with the Fifth and Eighth Amendments to the United States Constitution, a taxpayer can be imprisoned under 26 U.S.C. §7203 for the nonpayment of an honestly disclosed tax debt incurred during years in which the taxpayer made voluntary and substantial tax payments that were allocated to prior debts?

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PETITION FOR WRIT OF CERTIORARI

James Gibson Tucker, Jr., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming his conviction under 26 U.S.C. §7203 for the failure to pay an income tax debt.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 686 F.2d 230 (5th Cir. 1982). The district court's opinion (App. B) is reported at 524 F.Supp. 748 (E.D. La. 1981).

JURISDICTION

The judgment of the court of appeals (App. A) was entered on September 1, 1982. On October 12, 1982 the court of appeals denied a petition for rehearing and rehearing *en banc* (App. C). Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Eighth Amendment to the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATUTE INVOLVED

26 U.S.C. §7203 provides:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of the prosecution."

STATEMENT OF THE CASE

Tucker, an attorney, was convicted at a bench trial on a three count information alleging the willful failure to pay income tax debts incurred during 1975, 1976 and 1977 in violation of 26 U.S.C. §7203, hereafter the "Statute." (R. Vol. 1, p. 7).[1] The taxpayer was sentenced concurrently to one year imprisonment, six months of which were suspended with three years probation and the special condition that he pay the tax debt in thirty-four installments of $2,278.00. Should the conviction remain undisturbed,

[1] Unless otherwise indicated, all references to the record are labeled "R"; all references to the transcript are labeled "T"; all references to exhibits are labeled "Gov't. Ex." or "Def. Ex."; and all references to the stipulation are labeled "Stip."

Tucker will be the first American citizen to go to prison for the nonpayment of a tax debt honestly disclosed.[2]

Tucker's travails with the Internal Revenue Service, hereafter the "IRS," began when he and his wife failed to file federal income tax returns for 1962, 1963 and 1964. (T. Vol. 3, p. 169). In November of 1969, the taxpayer entered a plea of *nolo contendere* for failure to file during these years.[3] (T. Vol. 3, p. 173). From 1965 through the prosecution years, Tucker timely filed his federal income tax returns, but failed to fully pay the tax debt disclosed in the returns. (T. Vol. 3, p. 173; Gov't. Ex.'s 26 through 38). However, there was no evidence that Tucker failed at any time to honestly disclose the true amount of his tax liability. Indeed, the district court found that Tucker "...portray-(ed) a certain dignity of straightforwardness..." and that he

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[2] In the history of the Internal Revenue Code, there have been only two other reported cases involving the nonpayment of an honestly disclosed tax debt. *United States v. Palermo*, 259 F.2d 872 (3rd Cir. 1958) and *United States v. Goodman*, 190 F.Supp. 847 (N.D. Ill. 1961). In *Palermo*, the district court convicted the taxpayer on two counts and sentenced him to pay a fine. The court of appeals directed an acquittal on one count and remanded the other. In *Goodman*, the taxpayer was acquitted by the district court. Two other cases involving prosecutions for nonpayment are distinguishable because of evidence that the taxpayers failed to disclose the true amount owed. See *United States v. Andros*, 484 F.2d 531 (9th Cir. 1973) and *United States v. Magnus*, 365 F.2d 1007 (2nd Cir. 1966).

[3] In 1968 Tucker attempted to pay his 1962, 1963 and 1964 tax debt, but the IRS refused the payment. (Def. Ex. 13). Later, during two of the prosecution periods, 1975 and 1976, substantial payments made by Tucker in those years were allocated to the 1962 and 1963 debt. (Def. Ex. 39). It is also noted that Tucker's 1977 payment was allocated to Mrs. Tucker's separate tax liability for the year 1963. (Def. Ex. 44). Tucker and his wife were divorced in December of 1974. (Stip. 34).

conducted his affairs with "..basic threads of disclosure and lack of concealment." 524 F.Supp. 748, 750 (E.D. La. 1981).

Because of the failure to file investigation instituted against Tucker in the mid-1960's, the IRS did not undertake collection efforts until March of 1970, after his plea of *nolo contendere*. (Def. Ex. 1, p. 1). The following chart depicts Tucker's debt from 1962 through 1969 and the payments received by the IRS during those years.[4]

1962-1969

Year	Tax Liability	Unallocated Payments for Taxes	Percentage of Tax Liability Paid
1962	$ 1,710.59	-0-	0.0%
1963	2,701.71	-0-	0.0%
1964	1,193.44	-0-	0.0%
1965	3,770.00	-0-	0.0%
1966	7,555.36	$3,825.31	50.6%
1967	13,410.93	524.08	3.9%
1968	7,602.19	404.20	5.3%
1969	16,857.69	327.01	1.9%
TOTAL	$54,801.91	$5,080.60	9.3%

Beginning in March, 1970, when the IRS undertook collection efforts with Tucker, the increase in payments received by the IRS from 1970 through the prosecution

[4] The chart is based upon Defense Exhibit 44, which in turn is based upon the government's Certificates of Assessments and Payments (Gov't. Ex.'s 20-38; T. Vol. 3, p. 141). The exhibit chronicles payments received by the IRS annually without regard to the accounting allocation of the payments by the IRS. The propriety of the allocation system in a criminal case is discussed subsequently.

period is reflected in the following chart.[5]

1970-1977

Year	Tax Liability	Unallocated Payments for Taxes	Percentage of Tax Liability Paid
1970	$ 11,236.61	$ 28,520.40	253.8%
1971	9,179.28	6,792.75	74.0%
1972	3,163.42	25,462.35	804.9%
1973	31,096.00	5,720.44	18.4%
1974	12,315.31	14,842.23	120.5%
1975	10,043.65	4,766.71	47.5%
1976	24,626.11	19,258.53	78.2%
1977	12,011.37	6,243.02	52.0%
TOTAL	$113,671.75	$111,606.43	98.2%

Virtually all of Tucker's payments during the 1970's were allocated by the IRS to the debts, penalties, and interest incurred during the 1960's so that he was given a credit of only $158.53 for 1975; $251.66 for 1976; and $186.53 for 1977.[6] (Gov't. Ex. 72; T. Vol. 2, pp. 220-223).

Tucker's defense was that he intended to pay all of his tax debts, but that he was unable to do so because of substantial payments to liquidate the prior tax debts and because of other financial obligations he felt were necessary to maintain himself as a human being and as an

[5] The chart is based upon Defense Exhibit 44, which in turn is based upon the government's Certificates of Assessments and Payments (Gov't. Ex.'s 20-41; T. Vol. 3, p. 141).

[6] Tucker was aware that the payments received by the IRS during the 1970's were being allocated to delinquent taxes, penalties, and interest, but he was unaware of the right to designate payments for taxes only and not to penalties and interest. (T. Vol. 3, pp. 194-195).

income producing professional. (T. Vol. 3, pp. 167-204; Vol. 4, pp. 5-90).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals should be reviewed, pursuant to Rule 17, because it decided an important question of federal law contrary to a clear and enduring principle announced by this Court forty years ago, and because the decision, in rejecting the teachings of the Court, conflicts with the only other decision of a federal court of appeals on the same matter.

A unanimous Court in *Spies v. United States*, 317 U.S. 492, 497-498, made the following distinction between the failure to pay a tax and the failure to file a return:

> "The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. *United States v. Murdock*, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381. *It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return.* Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. *But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there*

> *had been no willful failure to disclose the liability is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer.*" (Emphasis added).

Every subsequent court to consider a prosecution for the failure to pay a tax, save the court below, has been guided by the principle announced in *Spies*. We respectfully submit that the quoted language means what it says, and we urge the Court to review the case especially since it is the only reported prosecution in the history of the Internal Revenue Code for the nonpayment of an honestly disclosed tax debt that resulted in a sentence of imprisonment.[7]

In *Spies*, the Court reviewed a felony conviction for the willful attempt to evade the income tax.[8] The taxpayer, who failed to file and pay during the prosecution year, requested and was denied an instruction that the willful failure to file and pay was insufficient to sustain the felony conviction and that proof of an affirmative act of evasion was essential. The government espoused the contrary position that the sum of two misdemeanors—the willful failure to file and pay[9]—was sufficient to make out

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[7] See footnote 2, *supra*.

[8] The conviction was for the violation of §145(b) of the Revenue Act of 1936, the predecessor of Sections 7201 and 7202 of Title 26 of the United States Code.

[9] Section 145(a) of the Revenue Act of 1936 defined the misdemeanors in essentially the same terms found in its successor, Section 7203 of Title 26 of the United States Code.

the felony. In reversing, and rejecting the government's position, the Court distinguished two separate aspects of the income tax revenue system, the regulatory function, which is largely concerned with the honest disclosure of income by taxpayers, and the tax collecting function of the system. The Court then reasoned that the inclusion of a nonpayment of a tax—a collection interest—within the same misdemeanor offense punishing the failure to file a return—a regulatory interest—indicated that Congress did not divide the misdemeanor and felony offenses along the contours of the separate functions of the tax revenue system. The Court stated:

> "Had §145(a) not included willful failure to pay a tax, it would have defined as misdemeanors generally a failure to observe statutory duties to make timely returns, keep records, or supply information—duties imposed to facilitate administration of the Act even if, because of insufficient net income, there were no duty to pay a tax. It would then be a permissible and perhaps an appropriate construction of §145(b) that it made felonies of the same willful omissions when there was the added element of duty to pay a tax." 317 U.S. at 498.

The Court concluded that a combination of the two disparate misdemeanors could not equal the *mens rea* of the felony as contended by the government and that that which distinguished the felony from the misdemeanors was the necessity of an additional element, an affirmative act to evade.

The *Spies* Court, however, was obviously concerned with the fact that Congress included in the same statute the offenses of failure to file a return and failure to pay a tax. It was in this context that the Court noted in dictum that the failure to file a return must be distinguished from the nonpayment of a tax in cases where the regulatory interest of the system is served by the taxpayer's honest disclosure of the debt owed. In this situation alone,[10] the bill collecting function of the system may collide with the Court's "...traditional aversion to imprisonment for debt...." 317 U.S. at 498. It was that aversion which compelled the Court to recognize in a case of nonpayment of an honestly disclosed debt the necessity of an additional showing of "...evil motive and want of justification in view of all the financial circumstances of the taxpayer." 317 U.S. at 498.

Thus, *Spies* poses and answers the question presented in this case, i.e., a taxpayer cannot be imprisoned for the nonpayment of an honestly disclosed tax debt under the Statute without at least a showing of an evil motive and lack of justification in view of all of the financial circumstances of the taxpayer. The lower court as-

[10] When one fails to pay a tax without filing a return, or when one fails to pay because of a false return, the aversion to imprisonment for debt is not implicated. In the first situation, the taxpayer goes to jail for failing to comply with a statutory duty "...which call(s) for compliance regardless of financial status...." *United States v. Bishop*, 412 U.S. 346, 354. In the second situation, the taxpayer, as any commercial debtor, goes to jail not for failing to pay the debt, but because he is a "cheat." See *Grimes v. Miller*, 429 F.Supp. 1350 (M.D. N.C. 1977), affirmed 434 U.S. 978.

sumed, *sub silentio*, that the Court rejected *Spies* in *United States v. Pomponio*, 429 U.S. 10, and in *United States v. Bishop*, 412 U.S. 346. The lower court was wrong in making that assumption.

Bishop involved a felony conviction for filing a false income tax return under 26 U.S.C. §7206. The taxpayer requested, but was denied a lesser-included-offense instruction for the misdemeanor violation of 26 U.S.C. §7207. The question presented was whether the word "willfully" had the same meaning in both statutes. The Court rejected the taxpayer's contention that willfully, when used in the misdemeanor statute, required less scienter—that is, caprice or careless disregard—than the bad purpose required by the felony statute. In referring to its prior formulations of the standard of willfulness, and specifically acknowledging *Spies*, the Court noted that it:

> "...has recognized that the word 'willfully' in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as 'bad faith or evil intent,' *Murdock*, 290 U.S., at 398, 54 S.Ct. at 226, or 'evil motive and want of justification in view of all the financial circumstances of the taxpayer,' *Spies*, 317 U.S., at 498, 63 S.Ct. at 368, or knowledge that the taxpayer 'should have reported more income than he did.' *Sansone*, 380 U.S., at 353, 85 S.Ct. at 1011. See *James v. United States*, 366 U.S. 213, 221, 81 S.Ct. 1052, 6 L.Ed.2d 246 (1961); *McCarthy v. United States*, 394 U.S. 459, 471, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969)." 421 U.S. at 360.

The Court concluded by saying:

> "Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done 'willfully,' the bad purpose or evil motive described in *Murdock*...." 412 U.S. at 361.[11]

In *Pomponio*, a case involving the willful filing of a false return under 26 U.S.C. §7206(1), the Court corrected a misconstruction put on *Bishop* by the court of appeals that required proof of a separate element of "bad purpose" or "evil motive" apart from "...the specific intent to violate the law...." 429 U.S. at 11. *Pomponio* noted that *Bishop's* reference to the Court's previous formulations of the standard of willfulness—including that of *Spies*—did not "modify" the formulation set forth in *Bishop*: a voluntary, intentional violation of a known legal duty. 429 U.S. at 12. Conversely, we submit, *Bishop's* formulation of the standard did not modify the earlier formulations announced in

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[11] *United States v. Murdock*, 290 U.S. 389, involved a misdemeanor conviction for failing to supply information in income tax returns under Section 1114(a) of the Revenue Act of 1926 and Section 146(a) of the Revenue Act of 1928, predecessors of 26 U.S.C. §7203. The question presented was whether the word "willfully" meant something more than voluntary. The Court held that:

> "The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with a bad purpose...." 290 U.S. at 394.

The Court concluded by noting that while the taxpayer's refusal to supply the information was "intentional and without legal justification," a jury might nonetheless find that he acted without "bad faith or evil intent, which the statute makes an element of the offense." 290 U.S. at 397-398.

Spies and the other cited decisions. *Pomponio* simply repeated that the *mens rea* of willfulness in both the felony and misdemeanor statutes is the same—a specific intent to violate the law, not some lesser standard of negligence—and that bad purpose or evil motive is embraced within the standard.

Clearly, *Pomponio* does not purport to dispel *Spies'* aversion to imprisonment for the nonpayment of a debt honestly disclosed. The fact remains, as the Court continued to recognize in *Bishop*, that when a regulatory interest of the tax system is served by the Statute, such as the requirement to file, compliance is required "regardless of financial status," whereas when a revenue collection interest is served, such as payment, compliance "...may place demands on a taxpayer he cannot meet." 412 U.S. at 354. What makes the instant case particularly troublesome is that the regulatory interest of the system was served by Tucker's honest disclosure, and as forseen by *Spies*, the case pits the government's bill collecting interest against the Constitution's aversion to debtor's prison.

Unquestionably, the government has the right to imprison taxpayers who refuse to pay taxes when they have the assets to pay. *Spies* makes it equally clear, however, that imprisonment for nonpayment of a tax debt honestly disclosed by a taxpayer who does not have the assets to pay offends the Constitution. While the evil motive element of *Spies* is embraced within the specific intent standard of *Pomponio*, there must nonetheless be a finding of

want of justification in view of all the financial circumstances of the taxpayer in order to save the Statute from an unconstitutional application. The court of appeals refused to recognize and cite *Spies*, as the district court refused to do, and both courts thereby committed error of constitutional dimension.

In its opinion, the court of appeals first addressed Tucker's argument on the sufficienty of the evidence.[12] The court reviewed the evidence, however, under a misinterpretation of the *Bishop* and *Pomponio* standard and without regard to *Spies'* admonition of the presence of a constitutional interest in a case such as this. Although the opinion correctly noted that the term "willful" means a voluntary, intentional violation of a known legal duty, and that willfully means "...to act voluntarily, purposefully, deliberately and intentionally, as distinguished from accidentally, inadvertently, or negligently," the court concluded by saying, completely misinterpreting *Pomponio*, that "a taxpayer's good or evil motive is not relevant in determining whether his act was willful under §7203." 686 F.2d at 232. *Pomponio* only held that proof of an evil motive was not required as a separate element of the of-

[12] We recognize that under Rule 17 the issue of insufficient evidence does not appear appropriate for review. We maintain, however, that even under the erroneous standard of culpability employed by the court of appeals, the evidence was insufficient. Among other things, the court of appeals relied upon certain so-called "luxury expenditures" made by Tucker in determining willfulness. The opinion failed to point out, however, that those expenditures amounted to only $2,370.18 in 1975; $4,826.86 in 1976; and $2,976.56 in 1977. Moreover, the opinion did not point out that during these same years Tucker paid the IRS more than three times the amount represented by these purchases. Defendant-Appellant's Petition for Rehearing, pp. 5-6.

fense there charged. There is nothing in *Pomponio*, or indeed in any of this Court's decisions, to suggest that the Court was departing from the hornbook principle that motive, good or bad, is always relevant in determining a specific intent to violate the law.

In the second half of its opinion, the lower court addressed Tucker's argument on the standard of culpability, but this time misconstrued the argument as being solely that "...the government must prove that the taxpayer was financially able to pay his tax debt when it came due." 686 F.2d at 233. The court characterized this argument as "...border(ing) on the ridiculous," but acknowledged that there was support for the argument in *United States v. Andros*, 484 F.2d 531 (9th Cir. 1973).[13] 686 F.2d at 233. The court declined to follow *Andros* because it felt that a "...taxpayer is obligated to conduct his financial affairs in such a way that he has cash available to satisfy his tax obligations on time."[14] 686 F.2d at 233. Otherwise, the

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[13] The *Andros* Court wrote:

> "To establish the offense of a willful failure to pay the taxes assessed, *the Government was required to prove* that the financial circumstances of the taxpayer were such that, on or about July 16, 1966, the taxpayer possessed sufficient funds to be able to meet his legal obligation to the Government and that he voluntarily and intentionally did not pay such taxes." (Emphasis added). 484 F.2d at 533-534.

[14] The court also rejected the holding of *United States v. Goodman*, 190 F.Supp. 847 (N.D. Ill. 1961), to the effect that a "taxpayer has no obligation to prefer the government as a creditor, or borrow money or agree to an assignment of his wages in order to pay his income tax liabilities on time." 585 F.2d at 233.

court reasoned, "...a recalcitrant taxpayer could simply dissipate his liquid assets at or near the time when his taxes come due and thereby evade criminal liability."[15] 686 F.2d at 233.

Accepting *arguendo* that the government need not prove the financial wherewithal to pay the debt on the date charged,[16] and that the government may use as evidence of culpability on the date of the offense prior acts of the taxpayer, not in and of themselves criminal, such as payments to other creditors, *Spies* nonetheless requires the finding of a "want of justification in view of all the financial circumstances of the taxpayer." 317 U.S. at 498.

Tucker's primary contention has always been that the refusal to recognize his "substantial"[17] and voluntary

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[15] During oral argument, counsel made the point that in a case such as this, unlike a garden variety criminal case, the duty arises on a future date and that in determining culpability, a taxpayer should not be penalized for actions undertaken prior to the accrual of the duty to pay. Chief Judge Clark made the analogy to the bail jumper who fails to show in court at a future date. The difference, of course, is that the law has no aversion for sending one to jail who contemptuously fails to show in court, whereas there is an aversion to sending one to jail for failure to pay a debt absent a showing of fraud or dishonesty.

[16] We submit at the very least when the government can prove on the date charged that the taxpayer possessed the assets to pay, or as in *Andros, supra*, had concealed assets, and then willfully fails to pay, such a case presents a more practical prosecution that avoids the constitutional pitfalls in this case.

[17] The district court characterized Tucker's payments to the IRS during the 1970's as "substantial." 524 F.Supp. at 749. The court of appeals disregarded this finding of fact.

payments made during the prosecution years as some justification for nonpayment of the prosecuted debt by the allocation of those payments to prior debts violates due process and puts the case within the confines of imprisonment for debt. In failing to address this issue, not only did the court of appeals ignore the teachings of *Spies*, but the court squarely placed the Fifth Circuit in conflict with the Third Circuit without acknowledging or citing the contrary result reached in *United States v. Palermo*, 259 F.2d 872 (3rd Cir. 1958).

In *Palermo*, the IRS allocated payments received during the prosecution period to a prior debt for which the taxpayer was not on trial. Additionally, the government, as in this case, used a series of defaults as evidence from which the trier of fact could infer the requisite intent for the crime charged.[18] The district court in *Palermo* had found as a special finding of fact that:

> "...where a man has knowingly and intentionally defaulted nine times running without exception, the conclusion is *inescapable*, in the absence of any substantial evidence to the contrary, that this series of defaults arose from an evil motive." (Emphasis added). *United States v. Palermo*, 157 F.Supp. 578, 582 (E.D. Pa. 1957).

The Third Circuit reversed and stated:

> "A 'series of defaults' made 'knowingly and intentionally' may well be probative of the element

[18] The lower court stated, "We find abundant evidence of willfulness in this record. Tucker has not timely paid his full income tax since 1962." 686 F.2d at 232.

> of 'evil motive', and strongly suggest its existence, but they do not, as the District Court held, make 'inescapable' the 'conclusion' of its existence." 259 F.2d at 881.

The Third Circuit went on to write, in reference to the allocation of payments to a prior debt:

> "It might be noted parenthetically that 'the series of defaults' finding fails to give consideration to the circumstances, established by the testimony, that the defendant actually paid approximately $21,500 in income taxes during the years 1948 to 1953, inclusive, against a tax liability of some $29,000 for the years 1947 to 1953, inclusive." 259 F.2d at 881.

Thus, *Palermo* recognizes the obvious, i.e., substantial and voluntary payments by the taxpayer during the prosecution period is probative of a lack of criminal intent in a failure to pay case regardless of the manner in which the IRS allocates the payments. A finding of willfulness under the Statute is directly related to the amount of taxes paid. In other words, the more taxes paid, the less likely a taxpayer's conduct should be deemed willful for purposes of the Statute and vice versa.

The district court in the instant case did not follow *Palermo* and treated the allocation of payments to the prior debt in the following manner:

> "It is sufficient here to observe that I find, beyond a reasonable doubt, that such prior

> obligations as did, then and there, exist, *form no excusable basis whatsoever* for the conduct or course of action hereafter discussed with respect to the taxes due for calendar years 1975, 1976 and 1977." (Emphasis added). 524 F.Supp. at 750.

The district court reasoned that since Tucker knew that his payments were being allocated by the IRS to prior debts, the substantial and voluntary payments made during the prosecution period formed no excusable basis whatsoever in determining willfulness under the Statute. In affirming, the court of appeals not only gave its approval to this reasoning, but went a step further by pinning its determination of willfulness on Tucker's prior defaults without giving any consideration to his substantial and voluntary payments.

We submit that while the allocation of payments is permissible for determining the amount of taxes civilly owed, it is impermissible to use an allocation system to deprive a taxpayer of justification for nonpayment and to shelter the debt for which the government seeks to imprison the taxpayer. By not giving *any* consideration to the voluntary and substantial payments made by Tucker during the prosecution period, either as some justification for his failure to pay the prosecuted debt, or as vitiating criminal intent in the prior defaults relied upon in determining willfulness, the lower courts violated Tucker's due process rights as foreseen by *Spies* and implemented in *Palermo*. In other words, the lower courts proceeded as though Tucker had made no payments either in the prosecution period or in prior years since the payments did not serve to vitiate

criminal intent for the prior defaults used to determine present intent nor did they serve as any justification whatsoever for the nonpayment of the prosecuted debt. It violates due process, we submit, to permit the government to have it both ways and, in the process, imprison the taxpayer. It is even more outrageous in the instant case when one considers that the 1962-1964 debts, to which payments were allocated, also underlie a previous conviction. Tucker's plea and sentence in 1969 squared him on that account with society and to use that debt—not merely as evidence of intent—but to shelter the prosecuted debt violates every civilized notion of fair play embodied in the Due Process clause of the Fifth Amendment to the United States Constitution.

The policy of the government and the law most assuredly must be to punish those who can but do not pay the national fisc. However, civilization long ago rejected the evils of debtor's prison.[19] The imprisonment of Tucker on the facts of this case goes beyond the "shadow of imprisonment for debt," *United States v. Goodman*, 190 F.Supp. 847, 857 (N.D. Ill. 1961), and offends the Fifth and Eighth Amendments to the United States Constitution.[20]

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[19] The early Roman Law of the Twelve Tables (451-450 B.C.) provided creditors with the choice of either dissecting the debtor's body and dividing its pieces or allowing the debtor to live and be sold into slavery. From this low point, civilization moved to the abolishment of debtor's prison in this country as early as 1641 in the Massachusetts Colony. *Massachusetts Body of Liberties, 1641*, §33.

[20] The sentence is barred by the Eighth Amendment and the conviction is barred by the Fifth Amendment on the facts of this case.

The court of appeals expressed a concern that any "recalcitrant taxpayer" could avoid punishment by filing a return and dissipating assets. 686 F.2d at 233. That is not what Tucker did. During the prosecution period and the preceding five years, Tucker paid to the IRS 98.2% of the taxes incurred during those years. During the prosecution period, he paid 64.8% of the taxes incurred. In effect, Tucker was prosecuted in the 1980's for debts incurred in the 1960's that he could not afford to fully discharge in the 1970's.

The untenability of the lower court's ruling becomes clearer when one considers the following: On December 31, 1974, Tucker owed the government in tax, penalties and interest approximately $70,000.00.[21] (Gov't. Ex.'s 20, 21, 22, 30, 33, 34, 35). Tucker's partnership draw from his law firm for 1975 amounted to $30,804.81. (Gov't. Ex. 14). If Tucker paid *all* of his draw in 1975 to the government, he still could not have paid his 1975 tax bill of $10,043.65. When the 1975 tax liability is added to Tucker's liability on December 31, 1974 and credit is given for the 1975 draw, the liability to the government as of December 31, 1975 would be $45,238.82. If Tucker paid *all* of his draw in 1976 of $69,180.31 to the government, he still could not have paid the entire tax liability for 1976 of $24,262.11, being short $684.64. (Gov't. Ex.'s 15, 5). This kind of debtor's plight might be an everyday occurrence in this country's civil courts, but it is a creditor's paradise foreign to an American court of criminal law.

[21] This figure is an approximation because it is impossible to determine from the Certificates of Assessments and Payments the exact amount of interest due on December 31, 1974.

The decision of the lower court is aberrational and should not be allowed to stand. It is contrary to every reported decision involving the nonpayment of an honestly disclosed tax debt. It ignores the principle announced by this Court in *Spies* some forty years ago, and is in conflict with the only other court of appeals decision on the same matter. It proclaims that motive is irrelevant in determining willfulness and then relies upon prior defaults to determine willfulness without considering substantial and voluntary payments either as some justification for nonpayment of the prosecuted debt or as vitiating intent in the prior defaults. It allows the government to deflect payments from the prosecuted debt to prior debts for which the taxpayer was not on trial and to some for which he was already tried. In short, it is a due process disaster.

Perhaps more disturbingly, it undoubtedly will result in a change in the Justice Department's reported policy against application of the Statute to nonpayment cases, where, as here, there is no evidence of evasion.[22] Indeed, in January of 1978 the IRS internally declined to prosecute Tucker because of "indicated lack of sources of evidence to prove willfulness" (Def. Ex. 38; T. Vol. 3, pp. 97-98). If for no other reason, this conviction should not stand under this Court's decision in *James v. United States*, 366 U.S. 213, since Tucker's conduct does not fall within the parameters proscribed by any reported case involving the nonpayment of a tax debt honestly disclosed.

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[22] *B. Hochman*, Income Tax Evasion: A Dynamic Discussion, *White Collar Crimes* (1980).

CONCLUSION

Tucker was not a model taxpayer, but he was, after all a taxpayer—and an honest one to boot. To imprison him for the debt he failed to pay, on the facts of this case, would, in the exclamation of the Pickwickian character, be "unekal."[23] We urge the Court to grant the writ.

Respectfully submitted,

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[23] " 'It strikes me, Sam,' said Mr. Pickwick, leaning over the ironrail at the stairhead, 'It strikes me, Sam, that imprisonment for debt is scarcely any punishment at all.'

'Think not, sir?' inquired Mr. Weller.

'You see how these fellows drink, and smoke, and roar,' replied Mr. Pickwick. 'It's quite impossible that they can mind it much.'

'Ah, that's just the wery thing, sir,' rejoined Sam, 'they don't mind it; it's a regular holiday to them—all porter and skittles. It's the t'other vuns as gets done over, vith this sort o'thing: them downhearted fellers as can't svig avay at the beer, nor play at skittles neither; them as vould pay if they could, and gets low by being boxed up. I'll tell you wot it is, sir; them as is always a idlin' in public houses it don't damage at all, and them as is alvays a workin' wen they can, it damages too much. It's unekal, as my father used to say wen his grog worn't made half-and-half: It's unekal, and that's the fault on it.' "

The Pickwick Papers, Charles Dickens.

CERTIFICATE OF SERVICE

This is to certify that copies of the Petition for Writ of Certiorari have been served upon the United States of America by placing three copies thereof in the United States Mail, postage prepaid, addressed to The Honorable Rex E. Lee, Solicitor General, Department of Justice, Main Justice Building, Room 5143, Washington, D.C. 20530, and by placing three copies thereof in the United States Mail, postage prepaid, addressed to the Honorable John Volz, United States Attorney for the Eastern District of Louisiana, Hale Boggs Federal Building, 500 Camp Street, New Orleans, Louisiana 70130. I further certify that all parties required to be served have been served.

New Orleans, Louisiana, this ____ day of November, 1982.

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